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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 VAL DINARDO,

11 Plaintiff,

12 v.

13 WOW 1 DAY PAINTING, LLC,

14 Defendant.

CASE NO. C16-1600JLR

ORDER ON MOTION FOR
SUMMARY JUDGMENT AND
ORDER TO SHOW CAUSE
REGARDING
COUNTERCLAIMS

15 **I. INTRODUCTION**

16 Before the court is Defendant Wow 1 Day Painting, LLC's ("Wow") motion for
17 summary judgment. (MSJ (Dkt. # 35).) The court has reviewed the motion, Plaintiff Val
18 DiNardo's responsive memorandum (Resp. (Dkt. # 38)), all other submissions filed in
19 support of or in opposition to the motion, the relevant portions of the record, and the
20 applicable law. Being fully advised,¹ the court GRANTS the motion. The court also

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22 ¹ Neither party requests oral argument, and the court concludes that such argument would
not be helpful to its disposition of Wow's motion. See Local Rule W.D. Wash. LCR 7(b)(2).

1 ORDERS the parties to show cause why Wow’s counterclaims should not be dismissed
2 without prejudice, as more fully described below.

3 **II. BACKGROUND**

4 Pursuant to a licensing agreement between Wow and its parent corporation, Wow
5 1 Day Painting, Inc. (“Wow Corporate”), Wow has an exclusive right and license to
6 market, sublicense, franchise, and distribute certain federally registered United States
7 trademarks, including the registered trademarks bearing Registration No. 4,143,638 (May
8 15, 2012), Registration No. 4,168,698 (July 3, 2012), Registration No. 6,644,008
9 (November 25, 2014), and Registration No. 4,644,097 (November 25, 2014). (Alisch
10 Decl. (Dkt. # 36) ¶ 2, 5, Exs 1, 4.) Wow attests that it, in turn, sublicensed the federally
11 registered trademarks to certain franchisees, including Mr. DiNardo. (*Id.* ¶ 6.)

12 Wow and Mr. DiNardo executed a franchise agreement on May 21, 2014, that was
13 effective on May 17, 2014 (“the Franchise Agreement”). (Graff Decl. (Dkt. # 37) ¶ 3,
14 Ex. 2 (“Franchise Agreement”).) The Franchise Agreement offers a system of providing
15 interior and exterior painting services in one day “using confidential methods,
16 procedures, and business techniques.” (Compl. (Dkt. # 1-1) ¶¶ 6-7.) Under the Franchise
17 Agreement, Wow granted to DiNardo the right to use the registered United States
18 trademarks—or “Marks” as defined in Recital B of the Agreement—“and related logos,
19 designs, brands, and slogans as may be added or modified from time to time.” (Franchise
20 Agreement at Recitals A-C, § 2.1.)

21 The Franchise Agreement expressly states that the term “Mark” is defined in
22 Recital B. (*Id.* § 2.1.) Recital B states:

1 The distinguishing characteristics of the System currently include, but are
2 not limited to, the registered U.S. trademarks shown in Schedule A and
3 related logos, designs, brands and slogans as may be added or modified from
4 time to time (collectively the “Marks”) which are licensed to [Wow] by
[Wow Corporate], . . . which [Wow] in turn licenses to [Mr. DiNardo] under
the terms and conditions set forth herein.

(*Id.*, Recital B.) Schedule A of the Agreement lists two Marks with registrations pending
as of February 24, 2014, and February 25, 2014, respectively. (*Id.*, Schedule A.) These
two Marks were ultimately registered on November 25, 2014, bearing the Registration
Nos. 4,644,088 and 4,644,097, respectively. (Alisch Decl. ¶ 5, Ex. 4 at 8-9.)

The Agreement contains the following integration clause:

Entire Agreement. Unless acknowledged and agreed in writing by both
parties, this Agreement, all Security Agreements, and all Guarantees set forth
the entire agreement between Franchisor and Franchisee and contain all of
the representations, warranties, terms, conditions, provisos, covenants,
undertakings and conditions agreed upon by them with reference to the
subject matter hereof. All other representations, warranties, terms,
conditions, provisos, covenants, understandings and agreements, whether
oral or written (including without limitation any letter of intent between the
parties and other pre-contractual representations), are waived and are
superseded by this Agreement. However, nothing in this Agreement or
related agreements is intended to disclaim any representation made by
Franchisor in the franchise disclosure document furnished to Franchisee as
required prior to entering into this Agreement.

(Franchise Agreement § 21.8.)

The Agreement also contains a choice of law provision:

Governing Law. This Agreement shall be construed and interpreted
according to the laws of the state of Washington, except that no Washington
statute or regulation shall apply or shall give rise to any right or claim unless
the Territory is in the State of Washington and such statute or regulation
would apply to this Agreement by its own terms in the absence of any choice
of law provision. The King County Superior Court in Seattle or the U.S.
District Court in Seattle, as appropriate, shall have exclusive jurisdiction to
entertain any proceeding relating to or arising out of this Agreement, and

1 Franchisee and Franchisor each consent to the jurisdiction of such Courts in
2 all matters related to this Agreement; provided that Franchisor may obtain
3 relief in such other jurisdictions as may be necessary or desirable to obtain
4 declaratory, injunctive or other relief to enforce the provisions of this
5 Agreement.

6 (*Id.* § 21.12.)

7 Mr. DiNardo admits that he executed the Agreement. (*Id.* ¶ 2, Ex. 1 (“DiNardo
8 Dep.”) at 56:7-57:1, 57:11-15; *see also* Compl. ¶ 14 (“[O]n May 21, 2014, [Mr.
9 DiNardo] entered into a Franchise Agreement with [Wow] effective May 17, 2014.”).)
10 Mr. DiNardo testified in his November 9, 2017, deposition that he did not read the
11 Agreement before signing it. (*Id.* at 58:5-7.) When asked why he did not read the
12 Agreement, he stated he “was probably too busy, at the time, to read it over,” and he
13 “didn’t really want to be bothered with it at the time.” (*Id.* at 58:13-14, 18-19.)

14 Mr. DiNardo alleges that Wow made certain misrepresentations to him. (*See*
15 Compl. ¶ 22.) During the discovery phase of the litigation, Wow asked Mr. DiNardo to
16 identify “each and every false statement, omission, or representation” that underpinned
17 his misrepresentation claim. (Graff Decl. ¶ 4, Ex. 3 (DiNardo’s Responses to Wow’s
18 Interrogatories and Requests for Production) at 2-3 (Answer to Interrogatory No. 3).) In
19 response to Wow’s interrogatory, Mr. DiNardo stated:

20 DiNardo should expect to make \$300,000 in sales the first year and \$400,000
21 in sales the second year. The margins include 10% for materials, 50% for
22 labor, 11% for the franchise, with a goal of 30% as net profit. 2% would go
to the National Ad Fund, which was supposed to fund national advertising.
Lee Adler admitted that the money was used for the back office expense and
not for advertising.

[Wow] represented that it was offering a revolutionary system with trade
secrets about how to paint a project in one day and would provide support

1 services to generate significant business for DiNardo, to as much as \$3
2 million per year.

3 [Wow] represented that the new franchise would be significantly marketed
4 by Wow 1 Day Painting, LLC in the State of Connecticut, and such
5 marketing efforts would include use of their call center operations and
6 internet operations, resulting in new business opportunities based on its
7 innovative business concept.

8 [Wow] represented that it would be dramatically expanding its presence in
9 the Northeastern United States, to include the State of Connecticut.

10 (*Id.*) Mr. DiNardo did not list any other alleged misrepresentations. (*See id.*) During his
11 November 9, 2017, deposition, Mr. DiNardo admitted that Wow made each of the
12 foregoing alleged misrepresentations after Mr. DiNardo had entered into the Agreement.
13 (DiNardo Dep. at 114:23-122:10.)

14 In response to Wow's motion for summary judgment, Mr. DiNardo filed an
15 affidavit in which he testifies that he relied on misrepresentations in the Agreement itself
16 "when deciding to enter into the . . . Agreement." (DiNardo Aff. (Dkt. # 39) ¶ 18.) Mr.
17 DiNardo also testifies in his affidavit that Wow's representatives made alleged
18 misrepresentations prior to his execution of the Agreement and that he relied on those
19 misrepresentations. (*See id.* ¶¶ 11-17.) He also states that "Wow . . . never discussed
20 with [him] any Marks beyond those listed in Schedule A [of the Agreement]," and "never
21 granted the right to use any of the registered trademarks claimed held or licensed to
22 [Wow] . . . at or after the signing of the . . . Agreement." (*Id.* ¶¶ 43-44.)

Mr. DiNardo stopped operating his franchise in October or November 2015.
(DiNardo Aff. ¶ 45.) In May 2016, Mr. DiNardo filed suit against Wow. (*See generally*
Compl.) Wow removed Mr. DiNardo's suit to federal court (Not. of Removal (Dkt. # 1)),

1 and the federal district court in Connecticut subsequently transferred the suit to this
2 district (*see* Dkt. # 18).

3 Mr. DiNardo asserts claims against Wow in state court in Connecticut for (1)
4 intentional misrepresentation (*see* Compl. ¶ 22²), (2) violation of Connecticut’s Unfair
5 Trade Practices Act (“UTPA”), Conn. Gen. Stat. §§ 42-110b(a) (*see* Compl. ¶ 20), and
6 (3) violations of Connecticut’s Business Opportunity Investment Act (“BOIA”), Conn.
7 Gen. Stat. §§ 36b-60, 36b-74(a) (*see* Compl. ¶ 22³). Wow countersued bringing claims
8 against Mr. DiNardo for breach of contract and payment of accounts receivable. (Ans. &
9 Counterclaims (Dkt. # 21) at 5-9.) Wow seeks both damages and an injunction
10 prohibiting Mr. DiNardo from further alleged violations of the non-competition
11 provisions of the Agreement. (*See id.*)

12 III. ANALYSIS

13 Wow moves for summary judgment on all of Mr. DiNardo’s claims. (*See*
14 MSJ; Reply (Dkt. # 41).) The court now considers Wow’s motion.

15 A. Standard for Summary Judgment

16 Summary judgment is appropriate if the evidence shows “that there is no genuine
17 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
18 Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
19 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is “material” if it might affect the

21 ² The complaint contains two paragraphs 22. (*See* Compl. at 6.) This reference is to the
first paragraph 22 on page six of the complaint.

22 ³ This reference is to the second paragraph 22 on page six of the complaint.

1 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
2 factual dispute is “‘genuine’ only if there is sufficient evidence for a reasonable fact
3 finder to find for the non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
4 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

5 The moving party bears the initial burden of showing there is no genuine dispute
6 of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at
7 323. If, like *Wow*, the moving party does not bear the ultimate burden of persuasion at
8 trial, it can show the absence of such a dispute in two ways: (1) by producing evidence
9 negating an essential element of the nonmoving party’s case, or (2) by showing that the
10 nonmoving party lacks evidence of an essential element of its claim or defense. *See*
11 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the
12 moving party meets its burden of production, the burden then shifts to the nonmoving
13 party to identify specific facts from which a fact finder could reasonably find in the
14 nonmoving party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 252.

15 The court is “required to view the facts and draw reasonable inferences in the light
16 most favorable to the [nonmoving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007).
17 The court may not weigh evidence or make credibility determinations in analyzing a
18 motion for summary judgment because those are “jury functions, not those of a judge.”
19 *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party “must do more than
20 simply show that there is some metaphysical doubt as to the material facts Where
21 the record taken as a whole could not lead a rational trier of fact to find for the
22 nonmoving party, there is no genuine issue for trial.” *Scott*, 550 U.S. at 380 (internal

1 quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,
2 475 U.S. 574, 586-87 (1986)).

3 **B. Choice of Law**

4 At the outset, the court must determine which state law applies to each of Mr.
5 DiNardo's claims. Wow asserts that the contractual choice of law provision in the
6 Franchise Agreement governs Mr. DiNardo's claims, and thus, Washington law applies
7 to all of the claims. (MSJ at 5.) Mr. DiNardo, however, argues that Connecticut law
8 applies to his statutory claims. (Resp. at 7-11.) In Washington, "a choice of law
9 provision in a contract does not govern tort claims arising out of the contract."
10 *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1066 (Wash. 1987). Mr.
11 DiNardo has not asserted a claim for breach of contract. (*See generally* Compl.) Thus,
12 the choice of law provision in the Agreement is not determinative of the law that the
13 court should apply to Mr. DiNardo's claims.

14 In suits arising under the court's diversity jurisdiction, the court must determine
15 whether to apply the law of the forum state or the law of another state. *See Kohlrantz v.*
16 *Oilmen Participation Corp.*, 441 F.3d 827, 833 (9th Cir. 2006). To make this
17 determination, the court applies the choice of law rules of the forum state. *Id.*
18 Washington employs a two-step approach to choice of law questions. First,
19 Washington's choice of law principles require the application of Washington law unless
20 there is an "actual conflict" with another applicable body of law. *Burnside v. Simpson*
21 *Paper Co.*, 864 P.2d 937, 942 (Wash. 1994). Second, if there is a conflict, Washington

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1 uses a “most significant relationship” test.⁴ *See Rice v. Dow Chem. Co.*, 875 P.2d 1213,
2 1217 (Wash. 1994).

3 For tort and similar statutory claims, the “most significant relationship” test
4 focuses on the place where the tortious conduct occurred, the place where the injury
5 occurred, the residences of the parties, and the place in which the parties’ relationship is
6 “centered.” *Id.* (citing Restatement (Second) of Conflicts of Laws § 145 for tort and CPA
7 claims); *see MKB Constructors v. Am. Zurich Ins. Co.*, 49 F. Supp. 3d 814, 832 (W.D.
8 Wash. 2014) (“Washington courts follow the Restatement (Second) of Conflicts of Laws
9 § 145 to determine which state’s law governs tort, IFCA, and CPA claims.”) (citing
10 *Tilden-Coil Constructors, Inc. v. Landmark Am. Ins. Co.*, 721 F. Supp. 2d 1007, 1016
11 (W.D. Wash. 2010) (analyzing choice of law for tort and CPA claims) and *Polygon Nw.*
12 *Co. v. Nat’l Fire & Marine Ins. Co.*, No. 11-92Z, 2011 WL 2020749 (W.D. Wash. May
13 24, 2011) (analyzing choice of law for IFCA and CPA claims)). As the party seeking the
14 application of another state’s law, Mr. DiNardo bears the burden of demonstrating that a
15 conflict exists. *Nichols v. Fed. Deposit Ins. Corp.*, No. C14-1796RSM, 2016 WL
16 696389, at *3 (W.D. Wash. Feb. 22, 2016) (citing *Burnside v. Simpson Paper Co.*, 864
17 P.2d 937, 942 (Wash. 1994)). The court applies these principles to each claim.

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21 ⁴ An “actual conflict” exists between Washington law and the laws or interests of another
22 state if application of the various states’ laws could produce diverging outcomes on the same
legal issue. *Erwin v. Cotter Health Ctrs.*, 167 P.3d 1112, 1120 (Wash. 2007).

1 1. Misrepresentation

2 Mr. DiNardo never asserts a conflict between Washington and Connecticut law
3 regarding his misrepresentation claim. (*See generally* Compl.) In fact, Mr. DiNardo
4 impliedly admits that Washington law applies to his misrepresentation claim by only
5 citing Washington law in support of that claim. (*See* Resp. at 15.) Accordingly, the court
6 applies Washington law to Mr. DiNardo’s misrepresentation claim.

7 2. UTPA

8 Mr. DiNardo asserts that an actual conflict exists between the laws of Washington
9 and Connecticut concerning his claim under Connecticut’s UTPA because Washington
10 does not have such a statute. (*See* Resp. at 9.) Wow counters that Connecticut’s UTPA
11 is comparable to Washington’s Consumer Protection Act (“CPA”) and that there is no
12 actual conflict between the two statutes as applied to Mr. DiNardo’s claim. (Reply at 5.)
13 The court agrees with Wow. First, the statutes are analogous and serve the same public
14 policy concerns. Connecticut’s UTPA provides that “[n]o person shall engage in unfair
15 methods of competition and unfair or deceptive acts or practices in the conduct of trade
16 or commerce.” Conn. Gen. Stat. § 42-110b. Similarly, Washington’s CPA provides that
17 ‘[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct
18 of any trade or commerce are hereby declared unlawful.’ RCW 19.86.020. Further, the
19 UTPA provides that “[a]ny person who suffers any ascertainable loss of money or
20 property, real or personal, as a result of the use or employment of a method, act or
21 practice prohibited by [the UTPA], may bring an action” Conn. Gen. Stat.
22 § 42-100g. Likewise, under the CPA, “[a]ny person who is injured in his or her business

1 or property by a violation of [the CPA] . . . may bring a civil action” RCW
2 19.86.090. Under both Acts, injured parties are entitled to damages and injunctive relief.
3 Conn. Gen. Stat. § 42-100g; RCW 19.867.090.

4 More specifically, the outcome of Wow’s motion for summary judgment on Mr.
5 DiNardo’s UTPA claim is the same regardless of whether the court considers it under
6 Connecticut or Washington law. *See Erwin*, 167 P.3d at 1120. Mr. DiNardo’s claim
7 under the UTPA relies solely on his allegations of misrepresentation. (*See* Compl. ¶ 20
8 (“The conduct of [Wow] alleged in this Count constitutes a deceptive act or practice
9 within the meaning of [UPTA] . . . in that said conduct constitutes a material
10 misrepresentation . . . likely to mislead a person acting reasonably under the
11 circumstances.”). The crux of Wow’s motion for summary judgment concerning Mr.
12 DiNardo’s UTPA claim is that Mr. DiNardo cannot prove that any alleged
13 misrepresentation was the proximate cause of his harm. (*See* Reply at 4.) To support a
14 claim under either Connecticut’s UTPA or Washington’s CPA, the plaintiff must prove
15 that the defendant’s alleged misrepresentation was the proximate cause of the plaintiff’s
16 injury. In Connecticut, proof of intentional or negligent misrepresentation will support an
17 UTPA claim where the “alleged misrepresentation was the proximate cause of [the
18 plaintiff’s] injury.” *McCann Real Equities Series XXII, LLC v. David McDermott*
19 *Chevrolet, Inc.*, 890 A.2d 140, 162 (Conn. Ct. App. 2006); *see also Pellet v. Keller*
20 *Williams Realty Corp.*, 172 A.3d 283, 298 (Conn. Ct. App. 2017) (holding that an
21 “essential element” of a cause of action under UTPA is that “the prohibited act was the
22 proximate cause of harm to the plaintiff”). Likewise, in Washington, “where a defendant

engaged in an unfair or deceptive act [under the CPA], and there has been an affirmative misrepresentation of fact, . . . there must be some demonstration of a causal link between the misrepresentation and the plaintiff’s injury.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash.*, 170 P.3d 10, 22 (Wash. 2007); *see also Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 391 P.3d 582, 587 (Wash. Ct. App. 2017). Thus, the court concludes that there is no “actual conflict” between Connecticut and Washington law because the outcome will not diverge irrespective of which law the court applies. *See Erwin*, 167 P.3d at 1120. Accordingly, the court applies Washington law to Wow’s motion for summary judgment on this claim.

3. BOIA

Next, the court considers the choice of law concerning Wow’s motion for summary judgment on Mr. DiNardo’s claims under the BOIA. Washington does not have a statute comparable to Connecticut’s BOIA, and thus, Mr. DiNardo argues that an actual conflict exists with respect to his claims under that Act. (Resp. at 9.) Wow does not identify a comparable Washington statute or otherwise respond to this argument in its reply. (*See generally* Reply.) Further, Wow appears to admit that Connecticut law applies to Mr. DiNardo’s claim under the BOIA by citing only Connecticut law in opposition to this claim. (*See id.* at 6-7.) Because Washington does not have a statute comparable to Connecticut’s BOIA, the court concludes that an actual conflict exists with respect to Mr. DiNardo’s claims under this statute.

The court also concludes that under Washington’s most significant relationship test, Connecticut law applies to Mr. DiNardo’s BOIA claims. The court first considers

1 the place where the alleged tortious conduct occurred. *See Rice*, 875 P.2d at 1217. The
2 record does not indicate where the parties executed the Franchise Agreement or where
3 Wow made the alleged misrepresentations. However, Mr. DiNardo is a resident of
4 Connecticut (Compl. ¶ 1), and after executing the Franchise Agreement, he operated his
5 franchise business there (*see* Franchise Agreement § 2.2, Schedule B). Mr. DiNardo also
6 traveled to Vancouver, British Columbia, Canada, to discuss Wow's franchise
7 opportunity (DiNardo Aff. ¶ 10) and attended training sessions there after he executed the
8 Franchise Agreement (*id.* ¶ 19). Despite the fact that Wow is a Washington limited
9 liability company (*see* Compl. ¶ 4), there is no indication in the record that any of the
10 alleged tortious conduct occurred in Washington. Based on the limited record before it,
11 the court concludes that the alleged tortious conduct occurred in British Columbia and
12 Connecticut.

13 The next factor the court considers is the location of the alleged injury. *Rice*, 875
14 P.2d at 1217. The court concludes that Mr. DiNardo's injury occurred in Connecticut
15 because he operated his franchise business there and thus would have incurred his losses
16 and damages there. (*See* Franchise Agreement § 2.2, Schedule B (describing franchise
17 territory in Connecticut).)

18 Another factor the court considers is the parties' residences. *See Rice*, 875 P.2d at
19 1217. Wow is a Washington limited liability company, whose sole member is a business
20 that is incorporated in British Columbia, Canada. (Ans. & Counterclaims at 5.) Further,
21 Wow's principal place of business is in British Columbia. (*Id.*) Mr. DiNardo, however,
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1 is a resident of Connecticut. (*Id.* at 6; Compl. ¶ 1.) Thus, the court concludes that this
2 factor is split between Washington, British Columbia, and Connecticut.

3 Finally, the court considers where the relationship of the parties is centered. *Rice*,
4 875 P.2d at 1217. The court concludes that this factor is split between British Columbia
5 and Connecticut. As noted above, Mr. DiNardo operated his franchise in Connecticut
6 pursuant to the parties' Franchise Agreement (*see* Franchise Agreement § 2.2, Schedule
7 B), but traveled to British Columbia to discuss the franchise opportunity with Wow's
8 representatives prior to executing the Franchise Agreement (DiNardo Aff. ¶ 10), and
9 traveled there again to participate in Wow's trainings subsequent to executing the
10 Franchise Agreement (*id.* ¶ 19).

11 On balance, the court concludes that Connecticut law applies to Mr. DiNardo's
12 claims under Connecticut's Business Opportunity Investment Act. The first, third, and
13 fourth factors in Washington's most significant relationship test are primarily split
14 between British Columbia and Connecticut. The second factor, however, the location of
15 the alleged injury, is in Connecticut. No factor favors the application of Washington law.
16 Considering the totality of the factors, the court applies Connecticut law to Mr.
17 DiNardo's BOIA claims.⁵

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21 ⁵ No party urged the application of British Columbia law. (*See* MSY; Resp.; Reply.)
22 Even if one of the parties had sought the application of British Columbia law, the court would
have still concluded that Connecticut law applies to Mr. DiNardo's BOIA claims due to the
court's analysis of the relevant factors above.

1 **C. Wow’s Motion for Summary Judgment of the Misrepresentation Claim**

2 To prevail on either a negligent or intentional misrepresentation claim, Mr.
3 DiNardo must prove by clear, cogent, and convincing evidence that he relied on the
4 alleged misrepresentation. *See Elcon Constr., Inc. v. E. Wash. Univ.*, 273 P.3d 965, 970
5 (Wash. 2012) (listing elements, including reliance, for intentional misrepresentation or
6 fraud); *Ross v. Kirner*, 172 P.3d 701, 704 (Wash. 2007) (listing elements, including
7 reliance, for negligent misrepresentation). Although reliance is ordinarily a question of
8 fact, summary judgment is appropriate if reasonable minds could reach but one
9 conclusion on the issue. *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 247 P.3d 790,
10 794 (Wash. 2011).

11 Wow argues that Mr. DiNardo cannot prove this element because he testified in
12 his deposition that all of the alleged misrepresentations occurred after he had entered into
13 the Franchise Agreement. (MSJ at 9 (citing DiNardo Dep. at 114:23-122:10; Franchise
14 Agreement).) Wow also asserts, based on Mr. DiNardo’s interrogatory response, that he
15 did not allege any misrepresentation in the Franchise Agreement itself. (*Id.* at 10.) As a
16 result, Wow argues that it is entitled to summary judgment on Mr. DiNardo’s
17 misrepresentation claim.

18 In response, Mr. DiNardo does not argue that he can somehow rely on statements
19 attributed to Wow after he entered into the Franchise Agreement. Instead, Mr. DiNardo
20 now claims that Wow made misrepresentations to him “during initial meetings and
21 telephone conversations prior to the signing of the Franchise Agreement.” (Resp. at 2.)
22 In support of these arguments, Mr. DiNardo submits an affidavit in which he details the

1 misrepresentations he states occurred prior to the execution of the Franchise Agreement.
2 (DiNardo Aff. ¶¶ 11-18.) In this same affidavit, he also states that “[t]he Franchise
3 Agreement itself made representation . . . which I relied upon when deciding to enter into
4 the Franchise Agreement.” (*Id.* ¶ 19.) Mr. DiNardo’s argument fails for two reasons.

5 First, Mr. DiNardo is forestalled from asserting that he relied upon any alleged
6 misrepresentation in the Franchise Agreement itself. During his deposition, he testified
7 that he did not read the Franchise Agreement prior to signing it. (DiNardo Dep. at
8 58:5-7.) Because Mr. DiNardo did not read the Agreement, the court concludes that Mr.
9 DiNardo cannot demonstrate by clear, cogent, and convincing evidence that he relied on
10 any alleged misrepresentation in the Franchise Agreement itself. *See Elcon Constr., Inc.*,
11 273 P.3d at 970.

12 Second, based on the “sham” affidavit rule, Mr. DiNardo cannot rely on
13 statements he now asserts about alleged misrepresentations Wow made prior to executing
14 the agreement. Specifically, Mr. DiNardo cannot submit an affidavit that contradicts his
15 prior deposition testimony for the purpose of manufacturing an issue of fact to defeat
16 Wow’s motion for summary judgment. *See Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d
17 262, 266 (9th Cir. 1991) (“The general rule in the Ninth Circuit is that a party cannot
18 create an issue of fact by an affidavit contradicting his prior deposition testimony.”). The
19 reason for this rule is that “[i]f a party who has been examined at length on deposition
20 could raise an issue of fact simply by submitting an affidavit contradicting his own prior
21 testimony, this would greatly diminish the utility of summary judgment as a procedure
22 for screening out sham issues of fact.” *Id.* Nevertheless, the Ninth Circuit cautions that

1 this rule should be “applied with caution.” *Van Asdale v. Int’l Game Tech.*, 577 F.3d
2 989, 998 (9th Cir. 2009). Specifically, “the inconsistency between a party’s deposition
3 testimony and subsequent affidavit must be clear and unambiguous,” and the court must
4 “make a factual determination that the contradiction was actually a ‘sham.’” *Id.* at
5 998-99. Thus, “the non-moving party is not precluded from elaborating upon, explaining
6 or clarifying prior testimony elicited by opposing counsel on deposition and minor
7 inconsistencies that result from an honest discrepancy, a mistake, or newly discovered
8 evidence afford no basis for excluding an opposition affidavit.” *Id.* (internal alterations
9 omitted) (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995)).

10 The court has examined both Mr. DiNardo’s deposition testimony and his later
11 affidavit. During Mr. DiNardo’s deposition, Wow’s counsel carefully asked Mr.
12 DiNardo about each of the alleged misrepresentations listed in his interrogatory response
13 and the timing of those alleged misrepresentations. (*See* DiNardo Dep. at 114:23-122:10;
14 *see also* Graff Decl. ¶ 4, Ex. 3 at 2-3.) In each instance, Mr. DiNardo specifically
15 identified the time period in which the alleged misrepresentation happened as occurring
16 after May 21, 2014—the day he executed the Franchise Agreement.⁶ Nevertheless, in his
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18 ⁶ For example, with respect to the first misrepresentation Mr. DiNardo identified in his
19 interrogatory response, he testifies as follows:

20 Q: And that was in the summer or spring of 2015?

21 A: Yes, I believe it was, unless it was in the fall of 2014. I can’t recall if it was in
the beginning—in the fall or in the spring.

22 Q: Either late 2014 or spring 2015?

A: Yes.

1 subsequently filed affidavit, Mr. DiNardo states an entirely new and much earlier time
2 period for Wow's alleged misrepresentations than the time period to which he testifies in

3
4 Q: So is—the second sentence of that first paragraph and your response to
interrogatory number three . . . Is that referring also to statements . . . in the fall of
2014 or spring of 2015?

5 A: Yes.

6 Q: . . . How about the same questions with the next sentence . . . ?

7 A: Yes.

Q: Same time?

A: Yes.

8 (DiNardo Dep. at 115:24-116:5, 116:10-23.) Concerning the timing of the second
misrepresentation Mr. DiNardo identified in his interrogatory response, he testified as follows:

9 Q: Was this all in the same time period during the July and August training –

10 A: Yes.

Q: -- in Vancouver?

11 A: Yes.

12 (*Id.* at 119:7-11; *see also id.* at 118:18-23.) Concerning the timing of the third misrepresentation
Mr. DiNardo identified in his interrogatory response, he testified as follows:

13 Q: Okay. And, again, were those conversations occurring with you, Mr. Dinardo,
during the Vancouver trainings in July and August 2014?

14 A: Yes.

15 (*Id.* at 121:18-21.) Concerning the timing of the last misrepresentation Mr. DiNardo identified
in his interrogatory response, he testified as follows:

16 Q: Again, were those statements made during the July and August 2014
trainings . . . ?

17 A: Yes.

18 (*Id.* at 122:1-4.) Finally, Mr. DiNardo again confirmed that all of the misrepresentations asserted
in his interrogatory response occurred prior to the execution the Franchise Agreement:

19 Q: Okay. So all of the—all of the representations you've identified then in
20 interrogatory number three were made . . . during the months of July or August
2014, while you were in training?

21 A: Yes.

22 (*Id.* at 122:5-10.)

1 his deposition. (*Compare* DiNardo Aff. ¶¶ 11-17 with DiNardo Dep. at 114:23-122:10.)
2 In his affidavit, Mr. DiNardo asserts for the first time that Wow made misrepresentations
3 to him prior to his execution of the Franchise Agreement. (*See* DiNardo Aff. ¶¶ 11-17.)
4 Despite these inconsistencies, nowhere in his affidavit does Mr. DiNardo attempt to
5 “elaborate[e] upon, explain[], or clarify[]” his prior deposition testimony. *See Van*
6 *Asdale*, 577 F.3d at 998-99. Indeed, he does not reference his deposition testimony at all.
7 (*See generally* DiNardo Aff.) Based on the foregoing, the court concludes that Mr.
8 DiNardo’s affidavit was submitted for the purpose of manufacturing an issue of fact to
9 defeat Wow’s motion for summary judgment and is, therefore, a sham. Mr. DiNardo
10 cannot rely on his affidavit to defeat this portion of Wow’s motion for summary
11 judgement, and accordingly, the court grants Wow summary judgment on Mr. DiNardo’s
12 misrepresentation claim.

13 **D. UTPA Claim**

14 Mr. DiNardo’s UTPA claim rests solely on his allegations of misrepresentation.
15 (*See* Compl. ¶¶ 1-21.) As noted above, the court applies Washington’s law under the
16 CPA to this claim because the court concluded that there was no actual conflict between
17 the laws of Connecticut and Washington with respect to the issue presented in Wow’s
18 motion for summary judgment. *See supra* § III.B.2. Under either statute, Mr. DiNardo
19 must show that his harm is proximately caused by Wow’s alleged misrepresentation. *See*
20 *id.* In other words, “[a] plaintiff must establish that, but for the defendant’s unfair or
21 deceptive practice, the plaintiff would not have suffered an injury.” *Indoor*
22 *Billboard/Washington*, 170 P.3d at 22; *see also Schnall v. AT&T Wireless Servs., Inc.*,

1 259 P.3d 129, 137 (Wash. 2011) (noting that Washington Supreme Court “established”
2 that “but for” proximate causation applies to a CPA claim “based on an affirmative
3 misrepresentation.”). Because Mr. DiNardo testified that all of the alleged
4 misrepresentations occurred after he executed the Franchise Agreement, because he
5 testified that he did not read the Franchise Agreement prior to signing it, and because the
6 court disregards his subsequently filed affidavit to the contrary, *see supra* § III.C., Mr.
7 DiNardo cannot demonstrate that his damages were proximately caused by Wow’s
8 alleged misrepresentations. In other words, he cannot demonstrate that but for Wow’s
9 misrepresentations, he would not have suffered an injury. Accordingly, the court grants
10 Wow’s motion for summary judgment on this claim as well.

11 **E. BOIA Claims**

12 Mr. DiNardo asserts claims against Wow based on Sections 36b-62, 36b-63, and
13 36b-67 of Connecticut’s BOIA. (*See* Compl. ¶ 22 (citing Conn Gen. Stat. §§ 36b-62,
14 36b-63, and 36b-67).) Wow argues that it is exempt from these claims because the BOIA
15 expressly states, in pertinent part, that “sections 36b-60 to 36b-80 [of BOIA], inclusive,
16 shall not apply to the sale of a marketing program made in conjunction with the licensing
17 of a registered trademark or service mark, provided . . . such trademark or service mark
18 has been effectively registered under federal law.” Conn. Gen. Stat. § 36b-61(2); (*see*
19 *also* MSJ at 5-6.)

20 Mr. DiNardo responds that Wow is not entitled to rely on this exemption because
21 the Franchise Agreement “only permitted the use of pending trademarks, not the use of
22 other licensed trademarks.” (Resp. at 14 (emphasis in original).) In particular, Mr.

1 DiNardo asserts that Wow provided him access to only two Marks—both of which were
2 not yet registered and did not become registered until approximately six months after Mr.
3 DiNardo signed the Franchise Agreement.⁷ (*See id.* at 13.)

4 As noted above, Schedule A specifically lists two Marks—both of which are
5 expressly described as “Status: Registration Pending.” (*Id.*, Schedule A.) The United
6 States Patent and Trademark Office ultimately registered these two Marks on November
7 25, 2014, with Registration Nos. 4,644,088 and 4,644,097. (Alisch Decl. ¶ 5, Ex. 4.)
8 The parties executed the Franchise Agreement on May 21, 2014, and Mr. DiNardo
9 operated the franchise until October or November of 2015. (*See* Franchise Agreement,
10 Signature Pages; Compl. ¶ 15; DiNardo Aff. ¶ 45.)

11 In addition to the foregoing two Marks, Wow Corporate also licensed the
12 registered trademarks bearing Registration Nos. 4,143,638 and 4,168,698 to Wow.
13 (Alisch Decl. ¶ 5, Ex. 4.) The latter two Marks, although not expressly listed in the
14 Franchise Agreement, were registered before the execution of the Franchise Agreement.
15 (*See id.*; *see also* Franchise Agreement.)

16 Mr. DiNardo’s argument that Wow only granted him license to use of the
17 trademarks with pending registrations listed in Schedule A is belied by the plain language
18 of the Franchise Agreement. The Franchise Agreement defines the term “Mark,”
19 collectively, as “[t]he distinguishing features of the System,” which “currently include,
20 but are not limited to, the registered trademarks shown in Schedule A and related logos,

21
22 ⁷ Mr DiNardo fails to argue that the exemption in section 36b-61(2) of the BOIA does not
apply for any other reason. (*See generally* Resp.)

1 designs, brands and slogans as may be added or modified from time to time.” (Franchise
2 Agreement, Recital B.) Mr. DiNardo does not dispute that Wow Corporate licensed to
3 Wow the registered trademarks bearing Registration Nos. 4,143,638 and 4,168,698.
4 (Alisch Decl. ¶ 5, Ex. 4.) The Franchise Agreement also states that the Marks, which are
5 licensed to Wow by Wow Corporate are, in turn, licensed by Wow to Mr. DiNardo. (*See*
6 Franchise Agreement, Recital B (stating that the Marks “are licensed to [Wow] by . . .
7 [Wow Corporate] . . . , which Marks [Wow] in turn licenses to [Mr. DiNardo] under the
8 terms and conditions set forth herein.”)); *see also id.*, Recital C (“The System includes,
9 but is not limited to, use and promotion of the Marks . . . to enable franchisees to compete
10 in the market for painting services.”).)

11 Mr. DiNardo attempts to create an issue of fact by submitting an affidavit stating
12 that he “was never granted the right to use any of the registered trademarks claimed held
13 or licensed to [Wow] . . . after the signing of the Franchise Agreement,” and that Wow
14 “never discussed with [him] any Marks beyond those listed in Schedule A.” (*See*
15 DiNardo Aff. ¶¶ 44-45.) Although Mr. DiNardo may not have used any Marks beyond
16 those listed in Schedule A (*see id.* ¶¶ 42-43), this does not mean he did not receive a
17 license to other trademarks. Indeed, as noted above, the language of the Licensing
18 Agreement states that he did. (*See* Franchise Agreement, Recital B.)

19 Mr. DiNardo may not create an issue of fact by providing parol evidence that
20 contradicts or varies the plain language of the Franchise Agreement. In effect, though his
21 affidavit, Mr. DiNardo attempts to eliminate the words in the Franchise Agreement that
22 state that the Marks “include, but are not limited to” the Marks shown in Schedule A.

1 (See Franchise Agreement, Recital B.) Under Washington law, extrinsic evidence may
2 be used whether or not contract language is ambiguous.⁸ *U.S. Life Ins. Co. v. Williams*,
3 919 P.2d 594, 597 (Wash. 1996) (citing *Berg v. Hudesman*, 801 P.2d 222, 230 (Wash.
4 1990)). However, extrinsic evidence must be used to illuminate what was written, not
5 what was intended to be written. *Hollis v. Garwall, Inc.*, 974 P.2d 836, 843 (Wash. 1999)
6 (citing *Nationwide Mut. Fire Ins. Co. v. Watson*, 840 P.2d 851, 857 (Wash. 1992)). Thus,
7 extrinsic evidence may not be used (1) to establish a party’s unilateral or subjective intent
8 as to the meaning of a contract word or term; (2) to show an intention independent of the
9 instrument; or (3) to vary, contradict, or modify the written word. *W. Wash. Corp. of*
10 *Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.2d 861, 866 (Wash. Ct. App. 2000). As
11 described above, Mr. DiNardo attempts to use portions of his affidavit to vary, modify or
12 contradict the terms of the Franchise Agreement.

13 Because Mr. DiNardo uses portions of his affidavit in an attempt to contradict or
14 vary the language of the integrated Franchise Agreement, the court does not consider
15 those portions of his affidavit in response to Wow’s motion for summary judgment. *See*
16 *William G. Hulbert, Jr. & Clare Mumford Hulbert Revocable Living Tr. v. Port of*
17 *Everett*, 245 P.3d 779, 784 (Wash. Ct. App. 2011) (“Extrinsic evidence may not,
18 however, be used to show an intention independent of the instrument or to vary,
19 contradict or modify the written word.” (internal quotation marks omitted)); *In re Mastro*,

20
21 ⁸ Based on the choice of law provision in the Franchise Agreement, the court applies
22 Washington law to this issue of contract interpretation. (See Franchise Agreement § 21.12
 (“This Agreement shall be construed and interpreted according to the laws of the state of
 Washington”).

1 No. BAP WW-10-1142-MKHJU, 2011 WL 3300140, at *5 (B.A.P. 9th Cir. May 10,
2 2011) (citing *Hearst Commc'ns Inc. v. Seattle Times Co.*, 115 P.3d 262, 270 & n.14
3 (Wash. 2005)) (stating that, under *Hearst*, the court may not consider extrinsic evidence
4 if the contract language is not reasonably susceptible to the meaning that the proffering
5 party attempts to attribute to it).

6 The plain language of the Franchise Agreement states that the Marks that Wow
7 licensed to Mr. DiNardo “included, but are not limited to” the Marks listed in Schedule
8 A. (Franchise Agreement, Recital B.) The additional Marks, which relate to the
9 franchise system and were licensed under the Franchise Agreement from Wow Corporate
10 to Wow and in turn to Mr. DiNardo (*see* Franchise Agreement, Recital B) included at
11 least two trademarks that were registered at the time the parties executed the Franchise
12 Agreement (Alisch Decl. ¶ 5, Ex. 4). These facts entitle Wow to summary judgment on
13 Mr. DiNardo’s BOIA claims because Wow falls within the exemption found in Section
14 36-61(2). *See* Conn. Gen. Stat. § 36b-61(2); *see also Dice v. City of Montesano*, 128
15 P.3d 1253, 1257 (Wash. Ct. App. 2006) (“Interpretation of an unambiguous contract is a
16 question of law, thus summary judgment is appropriate.”). Thus, the court grants Wow’s
17 motion for summary judgment to Wow on Mr. DiNardo’s BOIA claims.

18 **F. Order to Show Cause on Counterclaims**

19 Although the court has granted summary judgment to Wow on all of Mr.
20 DiNardo’s claims, *see supra* § III.C., D., E., Wow’s counterclaims against Mr. Dinardo
21 remain (*see* Ans. & Counterclaims). Wow alleges that the court has subject matter
22 jurisdiction over its counterclaims based on diversity jurisdiction. (*Id.*, Counterclaims

¶ 4.) Although there is complete diversity of citizenship between the parties, Wow has pleaded less than \$75,000.00 in damages. (*See id.* ¶ 12 (“As of October 2016, and under the foregoing agreements, Dinardo is indebted to Wow in the amount of at least \$10,992.54, which amounts are due and payable.”); *see also id.* ¶ 20 (alleging an identical amount).) In addition to \$10,992.54 in damages, Wow alleges that it is entitled to injunctive relief “ensuring that Dinardo is not . . . breaching the non-competition provisions of the Franchise Agreement and/or using confidential or proprietary information of Wow.” (*Id.* ¶ 28.) However, there is no information before the court concerning the value of Wow’s requested injunctive relief. (*See generally id.*) Thus, the court cannot conclude that the jurisdictional amount is met and that an independent basis for the court’s subject matter jurisdiction exists.

Nevertheless, because Wow’s counterclaims are compulsory,⁹ the court has discretion to retain jurisdiction over the counterclaims regardless of whether there is an independent basis for subject matter jurisdiction. *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 146 n.3 (9th Cir. 1982). When a case loses its federal substance, the court may decline jurisdiction over the remaining state law compulsory counterclaims. *In re Nucorp Energy Securities Litig.*, 772 F.2d 1486, 1491 (9th Cir. 1985). Considerations of “judicial economy, convenience and fairness to the litigants” factor into the court’s decision to exercise supplemental jurisdiction. *Id.* (citing *Hagans v. Lavine*, 415 U.S.

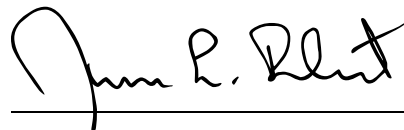
⁹ A compulsory counterclaim “arises out of the same transaction or occurrence that is the subject of the opposing party’s claims.” Fed. R. Civ. P. 13(a). Wow’s counterclaims arise out of the same Franchise Agreement at issue in Mr. DiNardo’s claims. (*See Ans. & Counterclaims, Counterclaims* ¶¶ 1-28.)

1 528, 546 (1974)). Accordingly, the court orders the parties to show cause why Wow's
2 counterclaims should not be dismissed without prejudice to possible re-filing in state
3 court.¹⁰ The court orders the parties to file simultaneous responses to the court's order to
4 show cause no later than January 31, 2018. The parties shall limit their responses to no
5 more than five (5) pages.

6 IV. CONCLUSION

7 Based on the foregoing analysis, the court GRANTS Wow's motion for summary
8 judgment on all of Mr. DiNardo's claims (Dkt. # 35). The court also ORDERS the
9 parties to show cause why Wow's compulsory counterclaims should not be dismissed
10 without prejudice. The court ORDERS the parties to file its responses to the court's
11 order to show cause no later than January 31, 2018, and to limit their responses to no
12 more than five (5) pages.

13 Dated this 23rd day of January, 2018.

14 

15 JAMES L. ROBART
16 United States District Judge

17
18
19
20

¹⁰ Although Wow removed this action from state court, the court cannot remand the
21 action to state court because the federal district court in Connecticut transferred this matter to the
22 Western District of Washington. (*See* Dkt. # 18.) Thus, if the court decides not to exercise its
discretion to retain jurisdiction over Wow's counterclaims, the court's only option is to dismiss
the counterclaims without prejudice to re-filing in the appropriate state court.